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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS RAYMOND DORSZYNSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	(iii-vi)
OPINION BELOW	1
JURISDICTION	1-2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTES INVOLVED	2-4
QUESTION PRESENTED FOR REVIEW	5
STATEMENT OF THE CASE	5-8
SUMMARY OF ARGUMENT	8-9
ARGUMENT	9-25
I. The Federal Youth Corrections Act Compels a Specific Finding by a Sentencing Court That the Youth Offender Would Not Benefit From Treatment Under the Act Before the Youth Offender Can Be Sentenced as an Adult	9-10
II. The Destruction of Valuable Rights on the Basis of a Silent Record Has Been Repeatedly Condemned by This Court	10-15
—The Federal Youth Corrections Act Creates Extremely Valuable Rights	10-11
—This Court Has Consistently Held That Due Process Requires Trial Courts To State Findings and Conclusions Before Valuable Rights Can Be Terminated	11
—A Statement of Reasons Is Required Before a Juvenile Can Be Prosecuted as an Adult	11-12
—A Statement of Reasons on the Record Is Necessary Before a Court Can Impose a Heavier Sentence Upon a Defendant Who Had Successfully Challenged His Original Conviction	13

Page

–Valid Guilty Pleas Require Appropriate Records 13-14

–Parole Cannot Be Revoked Without a Statment on the Reasons for Revoking Parole 14

–A Defendant Cannot Be Committed as a Sex Offender Unless the Trial Court Makes Meaningful Findings 14-15

III. Most Federal Courts Which Have Discussed This Issue Have Held, at a Minimum, That the Record Must Disclose the Reasons Why the Youth Offender Was Denied the Benefits of the Youth Corrections Act 16-22

IV. The Specific Facts of This Case Demonstrate the Need for Requiring Sentencing Courts To Articulate Their Reasons for Refusing To Apply the Federal Youth Corrections Act and Supporting Their Reasons Wtih Appropriate Findings Demonstrating That a Youth Offender Would Not Benefit From Treatment Under the Act 22-25

–When the Trial Court Commented Upon the Act in the Post-Conviction Hearing, the Court Misstated the Law When It Observed That the Act Was Not Applicable 22-23

–The Arraignment in This Case Was in Error Because the Petitioner Was Not Advised About the Consequences of a Committment Under the Act. He Was Told That He Faced One Year in Prison When, in Fact, He Was Facing a Potential Six Years of Incarceration and Supervision Under the Act 23-24

–The Trial Court Never Mentioned the Act at the Sentencing Proceeding 24

Page

—When There is a Silent Record, There is no Way To Know Whether the Commands of Congress Have Been Met 25

CONCLUSION 25-26

TABLE OF AUTHORITIES

Cases:

Carter v. United States, 306 F.2d 283 (D.C. Cir. 1962) 23

Cox v. United States, 473 F.2d 334 (4th Cir. 1973) 11, 20

Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958) 23

DeWitt v. United States, 383 F.2d 542 (5th Cir. 1967) 17

Dorszynski v. United States, 484 F.2d 849 (7th Cir. 1973) 1, 8, 21, 24

Kent v. United States, 383 U.S. 541 (1966) 11, 12

McCarthy v. United States, 394 U.S. 459 (1969) 13, 23

McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971) 25

Morrissey v. Brewer, 408 U.S. 471 (1972) 14, 15

North Carolina v. Pearce, 395 U.S. 711 (1969) 13

Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963) 23

Specht v. Patterson, 386 U.S. 605 (1967) 14

Standley v. United States, 318 F.2d 700 (9th Cir. 1963) 17

United States v. Butler, 481 F.2d 531 (D.C. Cir. 1973) 19

United States v. Carmichael, 469 F.2d 937 (D.C. Cir. 1972) 18

Page

United States v. Coefield, 476 F.2d 1152 (D.C. Cir. 1973) (en banc) 18, 19, 23

United States v. Forrest, 482 F.2d 777 (D.C. Cir. 1973) 19

United States v. Howard, 449 F.2d 1086 (D.C. Cir. 1971) 17

United States v. Jarratt, 471 F.2d 226 (9th Cir. 1972) cert. den. 411 U.S. 969 (1973) 20, 21

United States v. Kurzyna, 485 F.2d 517 (2nd Cir. 1973) 21

United States v. Matthews, 480 F.2d 1191 (D.C. Cir. 1973) 19

United States v. McDonald, 455 F.2d 1259 (1st Cir. 1972) 20

United States v. McDonald, 481 F.2d 513 (D.C. Cir. 1973) 16

United States v. Phillips, 479 F.2d 1200 (D.C. Cir. 1973) 19

United States v. Reed & Hoston, 476 F.2d 1145 (D.C. Cir. 1973) (en banc) 19

United States v. Riley, 481 F.2d 1127 (D.C. Cir. 1973) 19

United States v. Schenker, 486 F.2d 318 (5th Cir. 1973) 20

United States v. Thomas, 485 F.2d 1012 (D.C. Cir. 1973) 19

United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973) 19

United States v. Ward, 454 F.2d 992 (D.C. Cir. 1971) 18

United States v. Waters, 437 F.2d 722 (D.C. Cir. 1970) 16, 17, 20

United States Constitutional Provision:

Fifth Amendment 2

Page

Statutes:

18 U.S.C. §2 5
18 U.S.C. §3651 6
18 U.S.C. §4209 ..... 2, 16
18 U.S.C. §5006 ..... 3, 9, 21, 23
18 U.S.C. §5010 ..... *passim*
18 U.S.C. §5011 11
18 U.S.C. §5017 10
18 U.S.C. §5021 ..... 4, 11, 21
21 U.S.C. §844 5
26 U.S.C. §7237 20
28 U.S.C. §1254 2
28 U.S.C. §2255 7
22 D.C. Code §3202 (Supp. V, 1972), as amended by §205 of District of Columbia Court Reform Act, 85 Stat. 600 19

Federal Rules of Criminal Procedure:

Rule 11 ..... 13, 23
Rule 32 7
Rule 35 7

Other Authorities:

LaMar, Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons, 53 Boston U.L.R. 1071 (1973) 17, 18
Standards Relating to Appellate Review of Sentences, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §2.3(c) 24, 25
Standards Relating to Sentencing Alternatives and Procedures, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §5.6 24

Page

H.R. Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News 3983 ..... 10, 11

S. Rep. No. 2013, 85th Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News, pp. 3891 (1958) 17

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Page

H.R. Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News 3983 ..... 10, 11

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JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on July 20, 1973. An

application for certiorari was filed on August 16, 1973, and granted on December 10, 1973. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE V, Amendments to the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

TITLE 18, United States Code

Sec. 4209, Young Adult Offenders

> In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C. Chap. 402) sentence may be imposed pursuant to the provisions of such Act.

Sec. 5006, Definitions

As used in this chapter–

(a) "Board" means the Board of Parole;

(b) "Division" means the Youth Correction Division of the Board of Parole;

(c) "Bureau" means the Bureau of Prisons;

(d) "Director" means the Director of the Bureau;

(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;

(f) "Committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter;

(g) "Treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;

(h) "Conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

Sec. 5010, Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of

six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

Sec. 5021, Certificate Setting Aside Conviction

(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its descretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

QUESTION PRESENTED FOR REVIEW

Are sentencing courts compelled to state reasons on the record why a "youth offender" would not receive benefit from treatment under the Federal Youth Corrections Act before sentencing a "youth offender" as an adult.

STATEMENT OF THE CASE

At the conclusion of an undercover investigation, the petitioner and another person were arrested on October 20, 1971 for trafficking in LSD. Ap. pp. 9-10. After the arrest, DOUGLAS DORSZYNSKI made repeated visits to the office of the Justice Department's Bureau of Narcotics and Dangerous Drugs for the purpose of calling the supplier of the LSD and attempting tc make arrangements to assist the Bureau in infiltrating that operation. DORSZYNSKI made between twelve and fifteen visits. However, his efforts were unsuccessful. Ap. pp. 22, 31.

On February 14, 1972, DORSZYNSKI and the other person appeared before the United States District Court for the Eastern District of Wisconsin, the Honorable MYRON L. GORDON, District Judge, presiding, for purposes of filing an information, arraignment, plea and sentencing. The government filed a one count information against these two defendants charging them with the misdemeanor of possession of LSD without a prescription, in violation of §844(a), Title 21, United States Code and §2, Title 18, United States Code. Both defendants were represented by the same attorney and both pled guilty to the charge. Ap. pp. 6-11. The defendants were advised that the maximum penalty was one year in prison or fine of up to $5,000 or both. Ap. p. 6. DOUGLAS DORSZYNSKI at the time of the arraign-

ment was nineteen (19) years old and therefore subject to commitment under the Federal Youth Corrections Act. The Assistant United States Attorney mentioned that the Federal Youth Corrections Act was a potential sentence, but there was no statement on the record regarding the potential six (6) years of incarceration under that Act. Ap. p. 6.

The court then made inquiries of MR. DORSZYNSKI. MR. DORSZYNSKI stated that he was in his second year of college, that he understood the charges as being possession of LSD and that he could be committed to one year in prison or fined $5,000 or both. The Court then advised MR. DORSZYNSKI that he had a right to a trial by jury, to have witnesses against him appear and be confronted by them and that he was presumed innocent until and unless the government was able to prove that he was guilty beyond a reasonable doubt. The court also asked DORSZYNSKI whether there had been any pressures exercised upon him, any promises or threats and whether there had been any arrangements with respect to his penalty. MR. DORSZYNSKI responded in the negative. The court accepted the plea of guilty and entered a judgment of conviction. Ap. p. 7-8.

The court then adjourned to read the presentence investigation report which had been completed prior to these proceedings. Upon reconvening, the petitioner was allowed his right of allocution and the court committed him to the custody of the Attorney General for a period of one year. The court then ordered DORSZYNSKI confined to a jail facility for ninety (90) days and stayed the execution of the remainder of the sentence by placing the petitioner on probation for two years. See 18 U.S.C. §3651 (2nd paragraph). The court at no point commented upon the Federal Youth Corrections Act. Ap. pp. 11-14.

Numerous post-conviction motions were filed by the petitioner on April 7, 1972 and April 27, 1972. On May 1, 1972, the petitioner filed a "Supplemental Motion to Withdraw a Plea of Guilty, for a Reduction of Sentence, and to be Released from Custody Pursuant to 28 U.S.C. §2255." This motion was brought pursuant to the Federal Rules of Criminal Procedure, Rules 32(d) and 35, as well as 28 U.S.C. §2255. The petitioner asserted in this supplemental motion that he should be released from this sentence because he was not advised that he was subjecting himself to a possible incarceration of six (6) years pursuant to the Federal Youth Corrections Act and further that he was entitled to relief because the court did not make any finding that he would not derive benefit from treatment under the Federal Youth Corrections Act in violation of 18 U.S.C. §5010(d). Ap. p. 18.

On June 2, 1972, an extensive hearing was held on all of these motions. At the conclusion, the court rejected the contention of the petitioner that the Federal Youth Corrections Act compelled a specific finding by the court that a youth offender would not receive benefit from such a commitment prior to imposing an adult sentence. The court stated:

> "Further, it seems to me that the Court impliedly holds the Youth Corrections Act not applicable and it does, as it did in the instant case, apply the standard sentencing authorizations. In committing Mr. Dorszynski for a one-year period, using split sentence technique, I think the Court impliedly held that the Youth Corrections Act was not applicable." (Ap. p. 45.)

The court then revoked the petitioner's probation, holding that the petitioner had testified falsely with respect to other aspects of the case. (Ap. pp. 47-52).

The judgment of conviction, the denial of the post-conviction motions and the revocation of probation were all appealed to the United States Court of Appeals for the Seventh Circuit. In a decision dated July 20, 1973, that court reversed the district court's order revoking probation. However, in Part II of that decision, the United States Court of Appeals for the Seventh Circuit rejected the contention of the petitioner with respect to the Federal Youth Corrections Act and held that a trial judge was not required to make a specific finding on the record that the "youth offender [would] not derive benefit from treatment." The Court of Appeals stated:

> "The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to Section 5010(b) or (c). Insofar as *Waters* [*United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970)] requires that the trial judge make an explicit finding to that effect, we decline to follow it." 484 F.2d at p. 851. (Ap. p. 58).

This Court granted a petition for a writ of certiorari to review the holdings which involve the Federal Youth Corrections Act.

SUMMARY OF ARGUMENT

Congress created valuable rights when it enacted the Federal Youth Corrections Act. Youth offenders are eligible for specialized treatment and a setting aside of their convictions. The Act itself requires trial courts to "find that the youth offender will not derive benefit from treatment" under the Act before a trial court can impose an adult sentence. The United States Supreme

Court has consistently held that valid destruction of valuable rights will not be presumed from a silent record. Most courts of appeals have ordered trial courts to state their reasons for their decision to sentence a youth offender as an adult. Without a record, appellate courts can only resort to pure speculation when determining whether the benefits of the Act were properly denied.

ARGUMENT

I.

THE FEDERAL YOUTH CORRECTIONS ACT COMPELS A SPECIFIC FINDING BY A SENTENCING COURT THAT THE YOUTH OFFENDER WOULD NOT BENEFIT FROM TREATMENT UNDER THE ACT BEFORE THE YOUTH OFFENDER CAN BE SENTENCED AS AN ADULT.

A youth offender is defined by the Federal Youth Corrections Act as "a person under the age of twenty-two years at the time of conviction." 18 U.S.C. §5006(e). After the conviction of a person under the age of twenty-two years, the sentencing court has a wide area of statutory discretion and duties. The court may suspend the imposition or execution of the sentence and place the youth offender on probation. 18 U.S.C. §5010(a). The court may commit the youth offender under the Act. 18 U.S.C. §5010(b). Such a commitment subjects the youth offender to incarceration and supervision for a maximum period of six (6) years. 18 U.S.C. §5017(c). If the offense carries a penalty of imprisonment in excess of six (6) years and the court finds that the youth offender would "not be able to derive maximum benefit from treatment by the division prior to the expiration of six years from the date of conviction," the court can sentence the youth offender under the Act for a period in

excess of six (6) years but no greater than the maximum penalty provided by the offense. 18 U.S.C. §5010(c), 5017(d). The sentencing court can commit the youth offender for a maximum period of sixty (60) days for purposes of obtaining "additional information as to whether a youth offender will derive benefit from treatment" under the Act. 18 U.S.C. §5010(e). The Act states the following with respect to sentencing the youth offender as an adult:

> "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c) [18 U.S.C. §5010(b), (c)], then the court may sentence the youth offender under any other applicable penalty provision." 18 U.S.C. §5010(d).

There can be no doubt that the Federal Youth Corrections Act commands a finding by sentencing courts "that the youth offender will not derive benefit from treatment under" the Act as a prerequisite to sentencing the youth offender as an adult. The only issue involved in this case is whether that finding must be articulated on the record before imposing an adult sentence.

II.

THE DESTRUCTION OF VALUABLE RIGHTS ON THE BASIS OF A SILENT RECORD HAS BEEN REPEATEDLY CONDEMNED BY THIS COURT.

The Federal Youth Corrections Act was promulgated by a solicitous Congress interested in diverting such youth offenders from a life of crime. Its purpose is to avoid retribution with respect to youth offenders. The Act recognizes that, in many instances, immaturity breeds crime and that a youth offender may be deterred from a life of crime if he is treated in a manner which differs from the penalties exacted upon adults. See H.R.

Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News 3983, *et seq*. Thus, ideally, a committed youth offender is segregated from adult offenders and is provided with individualized treatment. See 18 U.S.C. §5011. In addition, youth offenders who are unconditionally discharged prior to the expiration of the maximum period of sentence or probation obtain an automatic setting aside of their convictions. 18 U.S.C. §5021. Thus, Congress has granted to youth offenders the opportunity to be "relieved from the future encumbrance of a prior criminal record." *Cox v. United States* 473 F.2d 334, 340 (f/n 4) (4th Cir. 1973). These Congressionally created rights are extremely valuable. Applying prior decisions of this Court, such valuable rights cannot be destroyed without due process of law as commanded by the Fifth Amendment to the United States Constitution. One of the requirements of due process of law which has been consistently found by this Court is that trial courts articulate their findings and their conclusions. This Court does not presume from silent records that valuable rights have been properly terminated.

In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court established numerous due process requirements which must be met before a juvenile in the District of Columbia can be prosecuted as an adult. Among the requirements found by the Court were a formal hearing and a determination of facts by the trial court. In addition, the decision to treat a juvenile as an adult can be reviewed on appeal. This Court stated the following:

> "We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such

> tremendous consequences without ceremony—without hearing, without effective assistance of counsel, *without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner.*" (Emphasis supplied) 383 U.S. at p. 554 .

and

> "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should neeessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review." 383 U.S. at p. 561.

The decision to sentence a youth offender as an adult is almost identical in its consequences to the decision to treat a juvenile as an adult. In both instances, the defendant is deprived of specialized treatment and relief from the burden of a criminal record. It appears to be inescapable that the holding of *Kent* requiring a statement of reasons is fully applicable to the Federal Youth Corrections Act.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court was presented with the constitutional issues surrounding the practice of imposing a heavier sentence upon a defendant who had successfully challenged his original conviction and was subsequently reconvicted. The Court established very stringent guidelines upon sentencing courts as a precondition to the imposition of such a sentence. One of the requirements imposed by this Court was that the sentencing court must state its reasons in the record. It is obvious that this requirement implements the constitutional rights which were threatened due to the possibility of an increased penalty after a successful appeal. The Court stated:

> "In order to assure the absence of such a motivation [vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." 395 U.S. at p. 726.

Rule 11, Federal Rules of Criminal Procedure, compels a trial judge to determine that a guilty plea is voluntarily made and entered "with understanding of the nature of the charge and the consequences of the plea." The government in *McCarthy v. United States*, 394 U.S. 459 (1969) argued that the voluntariness of a plea could be determined by a subsequent factfinding hearing in the cases where the record is silent on the subject. This Court rejected that contention with the following statement:

"There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (Emphasis the Court's). 394 U.S. at p. 470.

This Court explored the due process requirements of a parole revocation in *Morrissey v. Brewer*, 408 U.S. 471 (1972). One of the due process requirements found by the Court was "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U.S. at p. 489.

Prior to *Specht v. Patterson*, 386 U.S. 605 (1967), many states did not provide meaningful procedural rights to persons who were convicted of crimes and subsequently committed pursuant to a Sex Offenders Act. In *Specht*, the state of Colorado argued that the commitment under the Sex Offenders Act was nothing more than a sentencing alternative of a judge. When viewed in this light, Colorado urged that the due process requirements were identical to a regular sentencing proceeding. This Court rejected the Colorado position in *Specht*. The Court noted that a commitment under the Sex Offenders Act requires a new finding of fact which is not made when a person is found guilty of a criminal offense. "A distinct issue" is presented in a sex offender's sentencing proceeding. A multitude of rights which affects the future life of the defendant are resolved in such a proceeding. Under these circumstances, this Court held in *Specht* that:

"Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. *And there must be findings adequate to make meaningful any appeal that is allowed.*" (Emphasis supplied). 386 U.S. at p. 610.

This Court has been uniform in requiring a clear record when valuable rights are resolved in a court. Congress has legislated valuable rights to youth offenders. These rights should not be terminated without an appropriate hearing and without findings and conclusions on the record. Furthermore, since the Youth Corrections Act has as its core purpose the rehabilitation of youth offenders, the interests which are determined extend beyond the particular defendant. In this respect, a youth offender is in the same class as a parolee. This Court observed in *Morrissey v. Brewer, supra*:

> "This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information of the need to revoke parole, given the breach of parole conditions. (Citing a case) And society has a further interest in treating the parolee with basic fairness: Fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S. at pp. 483-484.

Society has an identical interest in restoring a youth offender to a "useful life within the law." Congress has resolved to accomplish this purpose by providing specialized and individualized treatment and by forgiving the transgressions of a youth offender. These Congressional rights should not be destroyed without a specific finding on the record, supported by reasons, "that the youth offender will not derive benefit from treatment under" the Act.

III.

MOST FEDERAL COURTS WHICH HAVE DISCUSSED THIS ISSUE HAVE HELD, AT A MINIMUM, THAT THE RECORD MUST DISCLOSE THE REASONS WHY THE YOUTH OFFENDER WAS DENIED THE BENEFITS OF THE YOUTH CORRECTIONS ACT.

Most of the reported litigation on the Federal Youth Corrections Act is in the District of Columbia. The issue was first triggered by the decision in *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970). The nineteen year old defendant in *Waters* was sentenced as an adult with a recommendation by the sentencing judge that Waters "be placed in a youth institution." 437 F.2d at p. 725. The youth offender challenged his sentence and, while this challenge was pending, he was transferred to an adult institution. While there, Waters was beaten by an older prisoner and suffered permanent injuries. The Court of Appeals for the District of Columbia held that a sentencing court must make a finding of fact in each individual case that a youth offender would not benefit from treatment under the Act before imposing an adult sentence.

The court in *Waters* compared the Youth Corrections Act with the sentencing alternatives provided for "young adult offenders" in 18 U.S.C. §4209. 437 F.2d at pp. 723-724. A young adult offender is a person who has been convicted of a national crime and is between the ages of twenty-two and twenty-six at the time of his conviction. *United States v. McDonald*, 481 F.2d 513 (D.C. Cir. 1973). Such an offender may be sentenced under the Federal Youth Corrections Act if "the court finds that there is reasonable grounds to believe that the defendant will benefit from treatment provided under"

that Act. The court noted the legislative history with respect to young adult offenders. Congress' purpose was to allow treatment under the Youth Corrections Act for "exceptional cases" and "when the court makes a special finding that the defendant would benefit by the treatment methods prescribed by that Act." 437 F.2d at pp. 722-723, (f/n 7) quoting from S. Rep. No. 2013, 85th Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News, pp. 3891, 3892 (1958). Thus, exceptional young adult offenders are committed as youth offenders and, conversely, only "exceptional" youth offenders are sentenced as adults. A sentencing court is required to make findings before committing a young adult as a youth offender. See *DeWitt v. United States*, 383 F.2d 542, 544 (5th Cir. 1967); *Standley v. United States*, 318 F.2d 700, 701 (9th Cir. 1963); and LaMar, *Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons*, 53 Boston U.L.R. 1071, 1079 (1973). Cf. *United States v. Wilson*, 450 F.2d 495, 498 (4th Cir. 1971) where the court ordered a new sentencing proceeding of a young adult when it appeared that the sentencing court may have erroneously imposed too harsh a sentence.

After *Waters*, the litigation in the District of Columbia concerned the extent of the findings which must be made by the sentencing court. In *United States v. Howard*, 449 F.2d 1086 (D.C. Cir. 1971), the court held that the Youth Corrections Act was applicable to a juvenile who was waived to the adult courts and convicted of murder. The court ordered a new sentencing proceeding and ordered the sentencing judge to consider the Federal Youth Corrections Act. This case demonstrates a strong policy reason for compelling a statement by a sentencing judge with respect to the Youth Corrections Act. Some sentencing judges may be confused regarding the scope

and application of the Act. If they are required to state their reasons on the record, any misunderstanding will be apparent and subject to correction. See LaMar, *Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons*, *supra*, 53 Boston U.L.R. at p. 1081.

The Court of Appeals for the District of Columbia reviewed numerous other refusals of sentencing courts to impose a sentence of a youth offender under the Act.[1] This series of cases culminated in *United States v. Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*). The court held that a finding of "no benefit" would not be implied. Trial courts were directed to make an explicit finding of "no benefit" and accompany that finding with a statement of "reasons from which it can be determined that it is consistent with the purposes of the Act." 476 F.2d at pp. 1157-1158. Specifically, the court held as follows:

> "We do consider it essential, however, to assure in every case: firstly, that the District Judge manifest not only an awareness that the Act is applicable to the case, but also an accurate understanding of the scope of his discretion under the Act; secondly, that the District Judge has been informed of the pertinent facts relating to the individual defendant before him, either by evidence coming to his attention in the trial, by a presentence report, or by a recommendation and report made under section 5010(e); and thirdly, that the District Judge, by his

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[1] *United States v. Ward*, 454 F.2d 992 (D.C. Cir. 1971); *United States v. Carmichael*, 469 F.2d 937 (D.C. Cir. 1972).

statement of reasons where required, has given consideration and related the facts of the individual case to the applicable law." *United States v. Coefield, supra*, 476 F.2d 1152, 1157-1158.

See also *United States v. Reed & Hoston*, 476 F.2d 1145, 1150 (D.C. Cir. 1973) (*en banc*).

Subsequent to *Coefield*, numerous cases in the Court of Appeals for the District of Columbia have further interpreted the holding. In *United States v. Phillips*, 479 F.2d 1200 (D.C. Cir. 1973), the court held that a sentence under the Federal Youth Corrections Act could not be denied with a mere recitation of past unsuccessful rehabilitation efforts. The court required an analysis of the prior efforts and a statement on the reasons for failure. It is quite possible that there was failure in the past because the program provided was inadequate. See *United States v. Riley*, 481 F.2d 1127 (D.C. Cir. 1973). Generally, the Court of Appeals for the District of Columbia has ordered resentencing proceedings to comply with the commands of *Coefield*. See *United States v. Matthews*, 480 F.2d 1191 (D.C. Cir. 1973); *United States v. Toy*, 482 F.2d 741 (D.C. Cir. 1973); *United States v. Forrest*, 482 F.2d 777 (D.C. Cir. 1973). In one instance found by the petitioner, the Court of Appeals for the District of Columbia held that the record made by the trial court was adequate to support a finding "that the youth offender will not benefit from treatment under" the Act. *United States v. Butler*, 481 F.2d 531, 536-537 (D.C. Cir. 1973). Thus, in the District of Columbia, an entire body of law is being developed on the scope and meaning of the Federal Youth Corrections Act.[2]

[2] In the District of Columbia, persons convicted a second time for a crime of violence, while armed are not eligible for treatment under the Federal Youth Corrections Act. 22 D.C. Code §3202 (Supp. V, 1972), as amended by §205 of District of Columbia Court Reform Act, 85 Stat. 600. *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973).

The United States Court of Appeals for the First Circuit in *United States v. McDonald*, 455 F.2d 1259 (1st Cir. 1972) held that a trial court erred when it ruled that a youth offender was not eligible for treatment under the Act because he was convicted of a drug offense governed by 26 U.S.C. §7237(d). Thus, the court ordered a remand to allow the trial court "to make the findings required by the Federal Youth Corrections Act." 455 F.2d at p. 1265. The court cited *Waters* with approval.

The United States Court of Appeals for the Fourth Circuit was presented with this issue in *Cox v. United States*, 473 F.2d 334 (4th Cir. 1973) (*en banc*). The trial court in *Cox* ruled that no finding of any kind whatsoever was required as a precondition to sentencing a youth offender as an adult. In remanding the case, the majority of the *en banc* court directed "the District Judge [to] explicitly find whether or not treatment under the Act would be beneficial to Cox." 473 F.2d at p. 337.

The United States Court of Appeals for the Fifth Circuit appears to have adopted the requirement for an explicit finding on the record that a "youth offender will not derive benefit from treatment under" the Act. In *United States v. Schenker*, 486 F.2d 318 (5th Cir. 1973), the government argued that the finding of "no benefit" is implicit because the trial court imposed an adult sentence. The Court of Appeals for the Fifth Circuit rejected that argument, vacated the sentence and ordered a resentencing proceeding "with appropriate findings under 18 U.S.C. §5010(d)."

The United States Court of Appeals for the Ninth Circuit in *United States v. Jarratt*, 471 F.2d 226 (9th Cir. 1972) *cert. den.* 411 U.S. 969 (1973) held that a youth

offender could be sentenced to probation as an adult.[3] The court held that the case had to be remanded due to a deficiency in the formal records. Even though the trial court stated explicitly that it did not intend to impose a sentence under the Act, the court made the following observation:

> "The court's stated intention to sentence him as an adult was an implicit finding that Jarratt would not derive benefit from treatment under paragraphs (b) or (c). Cf. United States v. Waters, 141 U.S. App. D.C. 289, 437 F.2d 722, 724 (1970). However, since we are remanding the case for resentencing for the reasons discussed *infra*, the district court should clarify its intention to place Jarratt on probation as an adult pursuant to paragraph (d) of §5010 by making an *express* finding that he will not derive

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[3] The United States Court of Appeals for the Second Circuit agreed with this holding of *Jarratt* in *United States v. Kurzyna*, 485 F.2d 517, 518-520 (2nd Cir. 1973). However, we disagree with these decisions. Such an interpretation is contrary to the plain meaning of 18 U.S.C. §5010(a) which states that a youth offender who does not need commitment can be placed on probation. Such a holding also destroys the plain meaning of 18 U.S.C. §5021(b) which states that a youth offender who is placed on probation obtains an automatic setting aside of his conviction upon early discharge. A "youth offender" is any person under the age of twenty-two. See Definitions at 18 U.S.C. §5006(e). He is a "youth offender" whether he is on probation, committed under the Act or committed as an adult. There is no recognition in the statutory scheme for labeling a person under the age of twenty-two as anything but a "youth offender." Thus, the provisions of 18 U.S.C. §5010(a) and 5021(b) are applicable to any "youth offender" who is placed on probation. This issue was brought to the attention of the United States Court of Appeals for the Seventh Circuit in this case and rejected by them at footnote 2 of the opinion. 484 F.2d at p. 851, Ap. p. 57.

benefit from treatment under paragraphs (b) or (c)." (Emphasis the court's). 471 F.2d at p. 230.

Thus it appears that most of the courts of appeal which have been presented with this issue have ordered trial courts to articulate their reasons on the record why a "youth offender will not derive benefit from treatment under" the Act. The Court of Appeals for the Seventh Circuit in this case erroneously declined to order the trial judge to state his reasons for sentencing DORSZYNSKI as an adult.

IV.

THE SPECIFIC FACTS OF THIS CASE DEMONSTRATE THE NEED FOR REQUIRING SENTENCING COURTS TO ARTICULATE THEIR REASONS FOR REFUSING TO APPLY THE FEDERAL YOUTH CORRECTIONS ACT AND SUPPORTING THEIR REASONS WITH APPROPRIATE FINDINGS DEMONSTRATING THAT A YOUTH OFFENDER WOULD NOT BENEFIT FROM TREATMENT UNDER THE ACT.

The only time the Federal Youth Corrections Act was mentioned by the trial court in this case was during the hearings conducted prusuant to the post-conviction motions. Ap. pp. 44-45. The court stated that, "in committing Mr. Dorszynski for a one-year period, using a split sentence technique, I think the Court impliedly held that the Youth Corrections Act was not *applicable*." (Emphasis supplied). Ap. p. 45. It is interesting to note that the precise language used by the sentencing court does not conform to the statutory language of 5010(d). The trial court stated that the Act was not applicable to the petitioner. That, on its face, is a misstatement of the law. The Federal Youth Corrections Act is applicable to all

persons convicted of a crime who are under the age of twenty-two.[4] 18 U.S.C. §5006(e). Under the Act, an adult sentence can only be meted out when the court makes a finding "that the youth offender will not derive benefit from treatment under" the Act.

At the arraignment in this case, the petitioner was advised that he faced "up to one year in prison and a fine of up to $5,000 or both." The petitioner was also advised that he might "be subject to the Federal Youth Corrections Act." Ap. p. 6. He was never advised that under that Act, he faced a period of incarceration and supervision of up to six (6) years. Thus, the arraignment violated Rule 11, Federal Rules of Criminal Procedure, and *McCarthy v. United States*, 394 U.S. 459 (1969). See *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963).

Three disturbing conclusions can be drawn from this arraignment. First, one might assume that the prosecuting attorney, the defense attorney and the court made a mistake in failing to advise the petitioner about the application of the Federal Youth Corrections Act. See testimony of the petitioner where he related that the first time he knew the consequences of his plea was when he was so advised by counsel who represented him after his conviction. Ap. p. 22. Secondly, it might be assumed from this record that the parties did not know that the Federal Youth Corrections Act when applied to a misdemeanor offense increased the penalty to six (6) years.[5] Thirdly, it might be assumed that the court never

[4] As pointed out previously, the Court of Appeals for the District of Columbia stated in *United States v. Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*), that the first item for the sentencing court to demonstrate is that the "Act is applicable to the case." See, text, *supra*, pp. 18-19.

[5] *Cunningham v. United States*, 256 F.2d 467 (5th Cir. 1958) and *Carter v. United States*, 306 F.2d 283 (D.C. Cir. 1962).

intended to impose a sentence under the Act. It is probably unfair to engage in such assumptions. However, when there is a silent record and a procedural error, appellate courts must resort to pure speculation to determine whether basic procedural and substantive rights have been provided to a defendant.

At the sentencing proceeding held after a recess, the petitioner's counsel asked at the conclusion of his statement to the court that the petitioner be placed "on probation under the Youth Corrections Act." Ap. p. 13. The trial court proceeded by pronouncing sentence. The court committed the petitioner to the custody of the Attorney General for a period of one (1) year, and then ordered that the petitioner be confined in a jail-type or treatment institution for ninety (90) days and, stayed the execution of the remainder of the sentence and placed the petitioner on probation for two (2) years. The trial court at no place mentioned the Federal Youth Corrections Act. The Court of Appeals interpreted this proceeding as supporting "the implication that . . . the petitioner would not derive benefit from treatment pursuant to Section 5010 (b) or (c)." 484 F.2d at p. 851. Ap. p. 58. The Court of Appeals could only assume that the inarticulated reasons for failing to apply the Act were appropriate ones.

The due process holdings previously enunciated by this Court and the clear language of the Act as interpreted by various courts of appeals demonstrate the error of the Court of Appeals for the Seventh Circuit. In addition, there is a clear trend in this country toward compelling sentencing courts to state their reasons for imposing a particular sentence. *Standards Relating to Sentencing Alternatives and Procedures*, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §5.6 and *Standards Relating to Appellate Review*

of Sentences, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §2.3(c). See also, *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971) for an extensive discussion of the A.B.A. Minimum Standards and its adoption by an appellate court. It is difficult to understand why a person who is charged with a misdemeanor, who cooperates with the Justice Department, and who is sentenced to probation is denied the benefits of the Act.

In this case, we must engage in pure speculation to determine why the petitioner was not properly advised regarding the potential period of incarceration involved in this prosecution; why the trial court did not believe that the petitioner would not benefit from treatment under the Act; whether the trial judge even considered the Federal Youth Corrections Act; and, whether the trial court in fact believed for some reason that the Act was not applicable rather than holding that the petitioner would not benefit from treatment under the Act. As pointed out previously, this Court has consistently held that there is no room in our system for a silent record when valuable rights are taken away from a citizen. It is totally inappropriate to assume from this silent record that the trial court validly denied the benefits of the Federal Youth Corrections Act to the petitioner.

CONCLUSION

On the basis of the foregoing it is respectfully requested that this Court reverse the orders and judg-

ments of the Court of Appeals for the Seventh Circuit in this case, and, either order the imposition of a sentence of probation under the Federal Youth Corrections Act, or order the case remanded to the trial court for further proceedings.

Respectfully submitted,

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